

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2051

Cir. Ct. No. 1996CF961035A

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS H. STREAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. CONEN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. In 1996, a jury found Douglas H. Stream guilty of first-degree intentional homicide as party to a crime. See WIS. STAT. §§ 940.01(1) & 939.05 (1997–1998). We affirmed Stream’s conviction on direct appeal. See *State v. Stream*, No. 1997AP318-CR, unpublished slip op. (WI App Feb. 17, 1998). In June of 2011, Stream filed a WIS. STAT. § 974.06 motion claiming that his trial and

postconviction lawyer gave him constitutionally deficient representation. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective assistance may be a sufficient reason for not having previously raised issues). The circuit court denied the motion without holding a hearing under *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (hearing to determine whether lawyer gave a defendant ineffective assistance). Stream claims that his trial lawyer was ineffective because the lawyer: (1) did not object during the pre-trial hearing to determine whether he was fully advised of his rights mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966), and whether his statements to the police were voluntary, *see State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), when the State and the trial court asked him whether his confession was true; and (2) did not ask for “mandatory exclusion” of all witnesses who were testifying at the *Miranda-Goodchild* hearing. He claims that his postconviction lawyer was ineffective because he did not challenge the trial lawyer’s ineffectiveness. We affirm.

I.

¶2 In 1996, Stream shot and killed Lucian Agnello’s foster father, Theodore Agnello, pursuant to Lucian Agnello’s and Stream’s joint plan. *See Stream*, No. 1997AP318-CR, unpublished slip op at *1; *State v. Agnello*, 226 Wis. 2d 164, 170, 593 N.W.2d 427, 429 (1999). Both confessed and were charged with first-degree intentional homicide as party to a crime. Both sought to suppress their confessions. The trial court held a combined *Miranda-Goodchild* hearing. During that hearing, the State and the trial court asked Stream if his confession was true, and his lawyer did not object:

Q. What’s contained in the document is the truth; is that correct?

- A. That's what the police wrote down, yes.
- Q. It's what you told the police; is that correct?
- A. Some of it, yes.
- Q. Well, what isn't?
- A. Can I read the whole thing?
- Q. Sure.
- A. The first part where my signature is.
- Q. Yes.
- A. Where it says-- The whole first paragraph that I signed where it says that I voluntarily made the statement without a lawyer present.
- Q. Let's try to make going through this a little quicker. The substance of the statement as to what happened is true because you were trying to be honest with the police; is that correct?
- A. I was trying to be honest with the police, yes.
- Q. And the fact when you told them that you had killed Mr. Agnello, that part was the truth; is that correct?
- A. That's what they wrote down in the statement, yes.
- Q. You're going to have to listen to my question, okay. The fact, the part when you told them that you had killed Mr. Agnello, that was a true statement; is that correct?
- A. That's what they wrote down. I don't know.
- [Prosecutor]: I would ask that he be instructed to answer the question.
- THE COURT: You need to answer the question, Mr. Stream.
- A. Yes, it is a true statement.
- [Prosecutor]: And the basic substance of the statement is true as to how it happened; is that correct?

A. No, it isn't.

Q. But the fact is you were-- When the officer wrote down that you were the person that killed Mr. Agnello, that's the truth; is that right?

A. That's what he wrote down, yes.

Q. And that's what happened; is that correct?

A. That's not what happened.

THE COURT: Is that a truth or is that a lie, Mr. Stream, what you told to the police?

A. The stuff I told them on the statement?

THE COURT: Is that a truth? Is that the truth or a lie?

A. That's the truth.

¶3 Not only did Stream's lawyer not object to this line of questioning, but asked in follow-up questioning:

Q. You're indicating that the statement is true. Are you referring that that's what you told the Detective is true?

A. This is what I told the Detective, yes.

Q. So you told-- You actually told the Detective that you did the shooting?

A. Yes.

Q. And that's what you're testifying in court today that that's what you told the detective at that time.

A. That's what I told the detective at the time, yes.

THE COURT: Well, did you tell them the truth or did you tell them a lie, Mr. Stream, at the time you told them that?

A. I told them the truth.

¶4 During the hearing, the State asked Agnello similar truthfulness-of-the-confession questions. Agnello's lawyer, however, objected.

¶5 At the end of the hearing, the trial court denied both Stream's and Agnello's motions to suppress their statements. As to Stream, the trial court reasoned:

As far as Mr. Stream's statement is concerned, the issues that I have to identify according to what was testified to here today are, number one, whether Mr. Stream in fact requested a lawyer at any point during his contact with the police and whether his will was somehow overborn by the police tactics in this case.

As to the first issue, again, it comes down to credibility. And here I find it absolutely incredible that the defendant Mr. Stream would have signed the waivers that he signed, acknowledging that he was fully molina [*sic*] in waiving his constitutional rights and agreeing to speak without a lawyer. I find it absolutely incredible that he would sign that without that having been the case and without that having been true. And I find it incredible to me that he would have made some requests for a lawyer that would have been dishonored by the police.

....

As far as the voluntariness of the statement is concerned, there is very little in this record to support the defense argument that Mr. Stream's statement was involuntary, over and above the fact that he had never been subjected to a police interrogation before. He is differently situated than Mr. Agnello in that regard. He doesn't have the same lengthy history with the criminal justice system.

There is nothing to suggest that his will was overborn, and I find nothing in what was testified to here today to lead me to believe that the statement was coerced out of him by some improper police tactic. And therefore, I will find beyond a reasonable doubt under the totality of the circumstances that the statement made by the defendant, Mr. Stream, to the police was a voluntary statement uncoerced by the police and is therefore admissible in the case in chief.

After the trial court denied the suppression motions, Agnello pled guilty and appealed. We affirmed, *see State v. Agnello*, No. 1996AP3406-CR, unpublished slip op at *1 (Wis. Ct. App. March 10, 1998), but the supreme court reversed, ruling that the State “improperly inquired into the truthfulness of Agnello’s confession,” and the “error was prejudicial” because “the circuit court relied on Agnello’s answers to the improper questions” to find the confession voluntary. *Agnello*, 226 Wis.2d at 178, 182, 593 N.W.2d at 433, 434. Of special significance here, *Agnello* held that the issue was preserved by Agnello’s lawyer’s objection. *Id.*, 226 Wis. 2d at 168, 593 N.W.2d at 428.

¶6 Stream did not plead guilty, and a jury convicted him. In his direct appeal, Stream claimed the trial court erred by: (1) not giving a jury instruction on coercion; (2) denying his motion to suppress his confession; (3) denying his motion to suppress physical evidence, and (4) imposing an unduly harsh sentence. We affirmed. *See Stream*, No. 1997AP318-CR, unpublished slip op. at *1.

II.

¶7 Stream argues that his postconviction lawyer was ineffective because the lawyer did not raise the issue of his trial lawyer’s ineffectiveness. Stream claims his trial lawyer gave him ineffective assistance because the lawyer: (1) did not object to the truthfulness-of-the-confession questions asked at the *Miranda-Goodchild* hearing, as had Agnello’s lawyer; and (2) did not ask for “mandatory exclusion” of all witnesses at the hearing.

¶8 In order to show constitutionally ineffective representation, Stream must show: (1) deficient representation; and (2) resulting prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient representation, he must point to specific acts or omissions by his lawyer that are

“outside the wide range of professionally competent assistance,” *see id.*, 466 U.S. at 690, and to prove resulting prejudice, he must show that his lawyer’s errors were so serious that he was deprived of a fair trial and reliable outcome, *see id.*, 466 U.S. at 687. We do not need to address both *Strickland* aspects if a defendant does not make a sufficient showing on either one. *See Id.*, 466 U.S. at 697.

¶9 The circuit court must hold an evidentiary hearing on an ineffective-assistance claim only if the defendant “alleges sufficient material facts that, if true, would entitle the defendant to relief.” *State v. Love*, 2005 WI 116, ¶26, 284 Wis. 2d 111, 123, 700 N.W.2d 62, 68 (quoted source omitted). If the postconviction motion does not assert sufficient facts, or presents only conclusory allegations, or if the Record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may deny the claim without a hearing. *Ibid.* We review *de novo* whether a defendant is entitled to an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50, 53 (1996).

A. Truthfulness-of-confession questions.

¶10 Stream claims that his trial lawyer gave him ineffective assistance because he did not object to the truthfulness-of-the-confession questions asked at the *Miranda-Goodchild* hearing. He argues that it is well-established law that the truthfulness of a confession is not relevant to whether the confession was voluntary. *See Jackson v. Denno*, 378 U.S. 368, 376–377 (1964) (“[V]oluntariness” must be determined “uninfluenced by the truth or falsity of the confession.”); *Agnello*, 226 Wis. 2d at 174, 593 N.W.2d at 431 (“It is well settled constitutional law that the truthfulness of a confession can play no role in determining whether that confession was voluntarily given.”).

¶11 As we have seen, a defendant claiming that his or her lawyer was constitutionally ineffective must show prejudice: that he or she was deprived of a fair trial and reliable outcome. *See also State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42 (in the absence of an objection, we address issues under the ineffective-assistance-of-counsel rubric); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (unobjected-to error must be analyzed under ineffective-assistance-of-counsel standards, even when error is of constitutional dimension).

¶12 In an attempt to prove prejudice, Stream points to *Agnello*'s assertion that the trial court's overruling of Agnello's objection was "hardly harmless, as the prosecutor's irrelevant line of questioning played a sizable role in the circuit court's ruling." *See Agnello*, 226 Wis. 2d at 178, 593 N.W.2d at 433. But, where an objection is preserved, the State must show that the trial court's error was harmless beyond a reasonable doubt. *Ibid.* ("[T]he State, as the beneficiary of the error, bears the burden of proving beyond a reasonable doubt that the error was harmless."). Thus, *Agnello*'s later comment that the trial court's error in overruling Agnello's objection "was prejudicial," *see id.*, 226 Wis. 2d at 182, 593 N.W.2d at 434, has no application here, where, as we have seen, Stream has the burden of showing prejudice—that is, that his lawyer's failure to object made the outcome of the proceeding "unreliable." Stream has not shown that the trial court relied on the confession's truth, rather than what the police did or did not do bearing on the voluntariness issue. This is clear from the trial court's ruling that we quote above, and Stream's reliance on the trial court's statement "I find it absolutely incredible that he would sign that without that having been the case and without that having been true" is unavailing because the trial court made that

statement in connection with whether Stream waived his *Miranda* rights, *not* whether his confession was “voluntary.” Thus *Agnello* is inapposite.

B. *Sequestration.*

¶13 Stream also argues his lawyer gave him ineffective assistance because the lawyer did not ask for “mandatory exclusion” of all the witnesses who testified at the *Miranda-Goodchild* hearing. Stream fails to prove deficient performance or prejudice.

¶14 At the start of the *Miranda-Goodchild* hearing, the State asked the trial court “for sequestration of witnesses.” *See* WIS. STAT. RULE 906.15. The trial court responded: “I will sequester all witnesses in the case.” Thus, there was no need for Stream’s lawyer to ask the court for what it had just ordered.

¶15 Stream’s more specific issue is that the State told the trial court: “Detective Temp is the first witness so I would ask that he remain in the courtroom. I would ask that Detective Lewandowski assist me at the counsel table.” Stream’s lawyer did not object. Stream claims that having Lewandowski hear Temp’s testimony caused prejudice because Lewandowski could adjust his testimony to match Temp’s. We disagree.

¶16 First, sequestration does not apply to “[a]n officer or employee of a party which is not a natural person designated as its representative by its attorney.” WIS. STAT. RULE 906.15(2)(b). The State is “a party which is not a natural person” and Lewandowski is an “officer or employee” of the State and was “designated” by the prosecutor as “its representative.” Thus, the trial court would have been within the law had it overruled Stream’s objection to Detective Lewandowski’s presence.

¶17 Second, as the circuit court found, the two detectives testified primarily about different subject matters:

- “Detective Temp testified primarily about his interaction with Lucian Agnello during the interrogation process, including obtaining information about the involvement of Douglas Stream in the homicide.”
- “Detective Lewandowski testified primarily about locating Douglas Stream’s house and going there with a search warrant.”

¶18 Stream points out an overlap in their testimony—both detectives described Stream’s house as a “Polish flat.” Stream has failed to show how the overlapping “Polish flat” descriptions prejudiced him.

¶19 Stream has not shown that his trial lawyer gave him ineffective assistance. Accordingly, it logically follows that his postconviction lawyer did not either.

By the Court.—Order affirmed.

Publication in the official reports is not recommended